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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. ———

UNITED STATES OF AMERICA, PETITIONER

v.

REPUBLIC OF FRANCE AND COMPAGNIE GENERALE TRANSATLANTIQUE

PETITION FOR A WRIT OF CERTIORAI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on May 5, 1961.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Texas is reported at 171 F. Supp. 497. The opinions of the Court of Appeals are reported at 290 F. 2d 395 (App. *infra*, p. 19).

JURISDICTION

The judgment of the court of appeals, sitting *en banc*, was entered on May 5, 1961 (App., *infra*, p. 37). A timely petition for rehearing *en banc* was denied on

July 11, 1961 (App., *infra*, p. 38). By order dated October 9, 1961, Mr. Justice Black extended the time for filing a petition for certiorari to and including December 8, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether under general maritime law a shipowner is relieved from liability for injuries which were the foreseeable result of negligence in creating a risk of fire when the injuries are in fact the result of an unforeseeable explosion caused by the fire.

2. Whether federal maritime law or local state law determines the rights of a shipowner to exoneration or limitation of liability from explosion damages on navigable waters and on shore caused by negligent acts done on navigable waters.[1]

STATUTE INVOLVED

The Admiralty Extension Act, 62 Stat. 496, 46 U.S.C. 740, provides:

> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.
>
> In any such case suit may be brought in rem or in personam according to the principles of

[1] If certiorari is granted, we reserve the right to present argument on the following, additional questions:

"Whether the shipowner's violation of the Dangerous Cargo Act constituted negligence *per se*.

"Whether proof of foreseeability is necessary to recovery on a theory of unseaworthiness."

law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: *Provided,* That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after the date of the passage of this act [June 19, 1948] and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: *Provided further,* That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage.

STATEMENT

BACKGROUND OF THE LITIGATION

This case originated in a petition brought in admiralty, pursuant to the Limitation of Shipowners' Liability Act, 46 U.S.C. 183 *et seq.*, by the respondent Republic of France and the respondent Compagnie Generale Transatlantique (hereinafter called the "French Line"), owner and operator of the ss GRANDCAMP, for exoneration or limitation of their liability arising out of the fire and explosion on that vessel at Texas City, Texas, on April 16, 1947. The potential liability for wrongful death, personal injuries and property damage from which the owners seek to be exonerated is $75,000,000.

The GRANDCAMP was moored at a pier in the harbor at Texas City, Texas, in the midst of a highly concentrated industrial complex of gasoline tank

farms, chemical plants, and petroleum refineries. She was taking on a cargo of ammonium nitrate fertilizer (FGAN) which had been manufactured for the United States under a government-sponsored fertilizer production program. Just after work started on the morning of April 16th, when the hold was about half filled, a small fire broke out in the cargo in #4 hold. 171 F. Supp. at 504. The fire was not promptly extinguished in its incipient stage, because the master ordered that no water be put on the fire. 171 F. Supp. at 508–509. The master battened down the hatch and injected live steam under pressure into the hold, whereupon the fire developed into an uncontrollable inferno forcing the crew and the longshoremen to abandon ship (171 F. Supp. at 504, 509). Shortly thereafter, the cargo exploded, spreading the fire and burning debris over the waterfront. Fire raged through refineries, gasoline storage tanks, chemical plants, and other structures in the port area for several days thereafter. The catastrophe resulted in more than 500 deaths, more than 3,000 personal injuries, and widespread destruction throughout the port area (171 F. Supp. at 500, 504–505). It is the government's belief that a substantial part of this damage took place within the immediate vicinity of the dock area, where similar destruction by fire could have been anticipated even had there been no explosion of the FGAN.

The petition of the Republic of France and La Compagnie Generale Transatlantique to limit their liability to the value of their interest in the GRANDCAMP, or to exonerate them from liability for the

disaster under the Limitation of Liability Act, 46 U.S.C. 183 was filed in the District Court for the Southern District of Texas on October 17, 1947. Several thousand victims of the Texas City disaster promptly brought claims against the respondents. The trial upon the issues presented was delayed pending the disposition of suits brought against the United States under the Federal Tort Claims Act, predicating liability "on the participation of the United States in the manufacture and transportation of FGAN." The negligence charged in these Tort Claims Act suits "was that the United States, without definitive investigation of FGAN properties, shipped or permitted shipment to a congested area without warning of the possibility of explosion under certain conditions." *Dalehite* v. *United States*, 346 U.S. 15, 23.[2] In 1953 this Court held that the United States was not liable on the ground that the claims came within the exception to the Tort Claims Act for discretionary functions. *Dalehite* v. *United States*, 346 U.S. 15.

Congress then enacted the Texas City Disaster Relief Act, August 12, 1955, 69 Stat. 707, under which the United States made payments to the un-

[2] On the issue of negligence the United States argued that it had no duty to warn that FGAN was a dangerous explosive because (1) both the ICC and the Coast Guard, in their regulations concerning the handling and transportation of dangerous materials, only classified ammonium nitrates as oxidizing agents, or fire hazards and (2) at the time of the accident, it was generally believed that nitrates such as FGAN would not explode under normal transportation conditions, but would require subjection to severe shock, such as the detonation of TNT, or exposure to very great heat and pressure.

insured disaster victims as gratuities but in amounts not exceeding $25,000 for any single loss. Pursuant to the provisions of the statute, the United States obtained assignments from the victims of all their rights of action against third parties. The United States then filed a claim in these proceedings as statutory assignee, and the district court dismissed the claims of the several thousand victims who had previously filed claims in the proceeding (171 F. Supp. at 501). The rights of action of the victims against the GRANDCAMP were thereafter prosecuted by the United States. The United States claims $350,000 damages in its own right for the loss of government property stored in a warehouse adjacent to the pier at which the GRANDCAMP was moored.

THE DISTRICT COURT PROCEEDINGS

Since this was a proceeding for the limitation of liability or exoneration pursuant to 46 U.S.C. 185 and Admiralty Rule 53, the court deferred consideration of the nature and merits of the several thousand individual claims until after it determined whether the disaster was caused by fault or negligence within the privity of the respondents.

After hearing evidence on this limited question the district court entered an interlocutory decree denying the petition for exoneration from or limitation of liability on the ground that faults and negligence within the privity and knowledge of the respondents caused the fire and the resulting damage. Its significant findings may be summarized as follows:

Since 1945 the Republic of France had known that FGAN is composed of 95 percent pure ammonium nitrate. Ammonium nitrate "has long been known and recognized * * * by all informed persons in the transportation industry, as an 'oxidizing agent' and a *fire* hazard" (171 F. Supp. at 503). Since long prior to 1947 this product has been classified by the Coast Guard as a "dangerous article" within the sub-class of "inflammable solids and oxidizing materials"[3] (ibid.). Ammonium nitrate was and is not classified as an explosive, however, because it is not considered probable that it will explode under normal transportation conditions.

Neither the master of the SS GRANDCAMP nor anyone else took adequate precautions to prevent smoking aboard the vessel, with the result that "longshoremen were permitted to, and did, smoke promiscuously" (171 F. Supp. at 507) in the holds containing FGAN. The fire originated in a carelessly discarded cigarette or match. The master was also negligent in accepting the FGAN aboard the vessel in broken containers in violation of safety regulations promulgated under the Dangerous Cargo Act which prohibits the acceptance of oxidizing agents in broken containers, 46 C.F.R. 146.02–14, and this viola-

[3] As the district court stated (171 F. Supp. at 503): "An 'oxidizing material' or 'oxidizing agent' is one which, while not necessarily inflammable itself (decomposes when brought in contact with burning organic matter, and releases oxygen in quantity, thus supporting and encouraging the fire, and causing a more rapid rate of combustion, and an increase in temperature (46 C.F.R., 146.22–3)."

tion increased the susceptibility of the stow to fire. The master was negligent again in fighting the fire with the vessel's steam smothering system. The effort to exclude air from the hold by steam was obviously futile because the FGAN itself supplies the oxygen necessary for combustion. Dousing is the accepted method of fighting a fire in the presence of oxidizing substances. Finally, the court found that the Republic of France was negligent because it did not inform the master of the dangerous nature of the cargo and that the GRANDCAMP was unseaworthy within the privity of the respondents in that she was improperly manned and stowed.

Although these findings of fault and privity would in themselves warrant a denial of a petition for limitation of liability or exoneration, since the remaining issues of proximate cause and damage were triable in the case in chief, the district court went further and found that each of the negligent acts constituted a proximate cause of the disaster. In particular, the court held that the negligence of the master in failing to promulgate and enforce "no smoking" regulations was the proximate cause of the fire, the explosion and all the ensuing damage. The " 'foreseeability' test is met," the court concluded, because, while "an explosion *of this sort*" was not foreseeable, the master could have "anticipated the danger of a disastrous fire" and "it is not necessary to foresee the *extent* of the damage which may ensue" (171 F. Supp. at 508–509 and fn. 8).

THE DECISION OF THE COURT OF APPEALS

The Fifth Circuit, sitting *en banc*, reversed the district court, without disturbing its findings of negligence or privity, on the ground that, under Texas law, damage caused by the explosion could not be attributed to the negligence of the respondents who, under the findings of the district court, could only be reasonably expected to have foreseen "a disastrous fire" (171 F. Supp. at 508) and not the explosion. The court of appeals directed the district court "to adjudge that the petitioners are not liable for any claim arising out of or consequent upon the explosion of the steamship Grandcamp" (App., *infra*, p. 32). Judge Hutcheson dissented.

The United States petitioned for a rehearing *en banc*, but the petition was denied without opinion, Judge Hutcheson again dissenting.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case to insure that justice is done in administering the rules of tort liability in one of the major disasters in recent decades. The negligence of the owners and master of the SS GRANDCAMP caused 500 deaths and 3000 personal injuries. There was also vast property damage. The claims encompassed by assignments to the United States total $70,000,000. It seems self-evident that this Court would grant certiorari to review the basic legal issues if individual suits on the claims were pending in scattered federal courts. Although the consolidation of all claims in one court eliminates the possibility of inconsistent rulings, this factor hardly reduces the importance of opening up every avenue for insuring that justice is done in a situa-

tion involving so many people and such large claims. Although the United States is the present owner of the claims, it is fair to assume that Congress would not retain the recovery as a shrewd bargain but, after deduction of sums already paid as gratuities and the costs of recovery, would provide for its distribution to the actual sufferers.

The court below misconceived the issues. Its decision is contrary to established principles of tort law, even as applied in decisions conservatively limiting liability. The court also committed plain error in failing to apply the Admiralty Extension Act of 1948 and federal maritime law.

1. The court of appeals took as its major premise the precept that "[i]n Texas, as elsewhere, not only proximate causal connection but also the very existence of a duty the breach of which will constitute actionable negligence depends upon reasonable foreseeability of consequences" (App., *infra*, p. 27). Its minor premise was that the explosion of the SS GRANDCAMP was not reasonably foreseeable. From this it concluded that "petitioners are not liable for any claim arising out of or consequent upon the explosion of the steampship Grandcamp" (App., *infra*, p. 32).

The supposed syllogism is a *non sequitur*. The court confused the question whether the defendant should reasonably have foreseen that his conduct might cause injury to the plaintiff with the question whether the harm to the plaintiff must occur through a foreseeable chain of events. These two questions must be kept distinct. There can be no negligence unless the defendant creates a foreseeable risk of harm

to some person or property. The modern view, to which the Texas courts apparently subscribe, is that the actor is not liable unless his alleged negligence creates a foreseeable risk of harm to the plaintiff. Restatement of Torts, Sec. 281, *Comment c.*; *Palsgraf* v. *Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99. We too accept this proposition. No one denies that this requirement can be satisfied in the present case with respect to a great number of the claims, for the Fifth Circuit did not dispute the district court's finding of foreseeability of "a disastrous fire" (171 F. Supp. at 508).[*]

Once the foreseeability of harm to the plaintiff is established, however, the defendant may be liable even though the particular chain of events through which the harm occurred was unforeseeable. The most that is required, even by those decisions which conservatively limit liability, is that the harm to the plaintiff must be within the general type of harm to the foreseeable risk of which the plaintiff was subjected by the defendant's negligent conduct. All the authorities concur in this view. II Harper & James, *The Law of Torts*, 1147–1149 (1956); Seavey, *Principles of Torts*, 56 Harv. L. Rev. 72, 91 (1942); *Mansey* v. *Webb*, 231 U.S. 150 (Holmes, J.); *Virginian Ry. Co.* v. *Viars*, 193 F. 2d 547 (C.A. 4); *Stanolind Oil & Gas* v. *Brown*, 62 F. 2d 398 (C.A. 5); *Johnson* v. *Kosmos Portland Cement Co.*, 64 F. 2d 193 (C.A. 6); *Interlake Iron Corp.* v. *Gartland S.S. Co.*, 121 F. 2d

[*] Moreover, in this case the Shipowner owed a statutory duty under the Dangerous Cargo Act, to the general public in the port area where dangerous cargoes were being handled. The violation would be negligence *per se*.

267 (C.A. 6), certiorari denied, 314 U.S. 681; *Hill* v. *Winsor*, 118 Mass. 251; *Bunting* v. *Hogsett*, 139 Pa. 363. Thus, Section 435 of the Restatement of Torts states in *Comment a.*—

> The fact that the actor, at the time of his negligent conduct, neither realized nor should have realized that it might cause harm to another in the manner in which it occurred, is not of itself sufficient to prevent him from being liable for the other's harm if his conduct was negligent towards the other and was in all other particulars a substantial factor in bringing about the harm.

In the present case neither the district court nor the court of appeals examined the merits of any particular claim. The sole question was whether respondents were guilty of negligence resulting in liability to *some* claimants from which they could not be exonerated. The order of the court of appeals can stand only if respondents were not liable on *any* claim presented.

Applying the principles set forth above, it seems plain that respondents were negligent toward at least some of the persons injured. A number of them were present themselves or owned property within the immediate vicinity of the dock where the SS GRANDCAMP was moored. The negligence of the master, in failing to prevent smoking, in violating the Coast Guard regulations prohibiting stowage of oxidizing material in broken and leaking bags and in failing to fight the fire by accepted methods, created an unreasonable risk that an uncontrollable fire would break out and injure persons and property in the area. It is also apparent

that those toward whom respondents were negligent might be injured in any one of a number of ways. Fires are too dangerous and too unpredictable to foresee the precise injury or exact chain of events. This was particularly true in the circumstances in which the respondents were negligent. The SS GRANDCAMP was moored in the midst of a concentrated area of chemical plants, petroleum refineries and tank farms. She lay adjacent to two piers loaded with ammonium nitrate, which was widely known as a dangerous combustible substance, and only 300 feet from the plant of Monsanto Chemical Company. She was 400 yards from a large grain elevator and only 800 yards from the tank farm and oil docks of the Carbide & Carbon Co. To create the risk of fire in the presence of dangerous oxidizing material in the midst of this industrial complex created a wide range of risks to those in the vicinity. Respondents therefore became liable to those to whom injury was foreseeable when the same general type of harm occurred, even though the precise type of harm and exact chain of events—the detonation of the vessel—was not to be anticipated.

To make the point precise, consider the situation of valuable property located within the vicinity of the dock where the SS GRANDCAMP was moored. It was foreseeable that fire would break out and become uncontrollable as a result of either the failure to enforce no-smoking regulations or the omission of proper methods of fighting the fire once it broke out in the hold. Thus, the risk that the property would

be damaged was foreseeable and respondents' claim is reduced to the assertion that the property, instead of being consumed in any one of the ways incident to a large and uncontrollable fire, was destroyed by concussion or the holocaust resulting from explosion. The answer is insufficient under the principles outlined above, but it is also invalid for another reason. The chemical plants and tank farms in the vicinity made it quite likely that explosions of some kind would occur in the area. No one can seriously suggest that, although the respondents would be liable because they could and should have foreseen that an uncontrollable fire might result and spread to a chemical plant or tank farm and cause an explosion which injured property in the vicinity, they are not liable for the injury to that property which occurred through explosion of the vessel. In each instance there was an "explosion risk." Respondents are therefore liable for the damage done to the property by explosion even though they could not foresee the explosion that actually occurred.

The court of appeals was largely influenced by what it erroneously supposed to be the inconsistency of the United States in first denying liability in the *Dalehite* case upon the ground that it was not negligent in failing to foresee an explosion and then seeking to impose liability upon the SS GRANDCAMP and the French line. A technical answer is that although the United States argued that an explosion was not foreseeable, the issue is not *res judicata* both because the point was not decided by the Supreme Court and because there is no identity of parties to the two litigations. We fully agree, however, that it

would be unbecoming for the United States to assert inconsistent positions first in defending itself and later in seeking to impose liability upon others. The full answer is that there is not the slightest inconsistency in the government's position. In *Dalehite* it argued that there was no negligence in the manufacture of the FGAN, that all the carriers and handlers had full notice of its known properties (including the fact that it is an oxidizing agent) and that an explosion of the FGAN was not foreseeable if it was handled in accordance with established practices. We stand by these propositions here. Our contention, as stated earlier, is that the respondents are liable even though the explosion itself was not foreseeable. In suggesting that the United States is guilty of unbecoming inconsistency, the court below was misled by the same error that vitiates its analysis of the merits. It confused the principles which determine whether a defendant has been negligent toward the injured person with the principles which govern the extent of liability once actionable negligence is shown.

The only possible ground for accusing the United States of negligence was the contention that it should have foreseen and guarded against an explosion. Respondents were guilty of negligence in subjecting persons and property in the vicinity to the manifold risks of an uncontrollable fire. They became liable when the risk of damage to these persons and property eventuated even though they could not have foreseen the precise sequence of events.

2. The court below erred in deciding the case according to its view of Texas law. Federal maritime law is controlling. The Admiralty Extension Act of

1948 extends the jurisdiction of the admiralty courts to include any tort involving a negligent act committed on navigable waters which causes injury on land.[4] It clearly provides that the law to be applied to determine the rights and liabilities of the parties is that which would be applicable if all elements of the tort had occurred on navigable waters:

> In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water * * *.

Maritime law is therefore applicable to determine the liability of the respondents for negligence aboard the GRANDCAMP.[5]

Although the example given in the House Report involves a collision between a vessel and a bridge (H. Rep. No. 1523, 80th Cong., 2d Sess.), the situation is indistinguishable when a negligent fire or explosion on shipboard causes damage on land. Nor is it significant that the Admiralty Extension Act was passed in 1948, after the Texas City disaster. The

[4] Prior to passage of this statute, admiralty courts did not have jurisdiction over these so-called ambulatory torts. 1 Benedict, *Admiralty* (6th ed., 1940, Knauth), § 128. However, in a limitation of liability proceeding a court could entertain a non-maritime tort and apply substantive maritime law thereto. *Richardson* v. *Harmon*, 222 U.S. 96; *United States* v. *Norfolk-Berkley Bridge Corp.*, 29 F. 2d 115 (E.D. Va.).

[5] Since Texas would apply maritime law to a wrongful death action based upon a maritime tort, *Vassallo* v. *Nederl-Amerik Stoomv Maats Holland*, 344 S.W. 2d 421, the claims for wrongful death in this case should have been determined under maritime law.

Act applies retroactively to causes of action arising prior to its passage[6] except in suits in which the United States is a defendant.[7]

The Fifth Circuit's application of state law was not only a critical error in this highly important case; unless reviewed it will stand as a binding precedent upon a matter of continuing importance.

It is true that the government did not call attention to the Admiralty Extension Act in its original brief in the court of appeals. It principal arguments were addressed to matters of normal concern in a proceeding for exoneration or the limitation of liability—the negligence of the petitioners (*i.e.*, of the present respondents), the seaworthiness of the vessel, and the question of privity. The government's principal argument upon legal cause was that the question was not yet before the court because the validity of particular claims was not in issue. When an opinion was delivered showing that theories concerning the law of negligence and legal cause had been confused and made decisive, the government filed a petition for rehearing pointing out that the case was governed by federal maritime law. So plain an error should not go uncorrected in so important a case merely because the government failed to ap-

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[6] *United States* v. *Matson Nav. Co.*, 201 F. 2d 610 (C.A. 9); *All America Cables & Radio, Inc.* v. *The Dieppe*, 93 F. Supp. 923 (S.D. N.Y.)

[7] *Vega* v. *United States*, 86 F. Supp. 293 (S.D. N.Y.), affirmed, 191 F. 2d 921 (C.A. 2), certiorari denied, 343 U.S. 909.

preciate earlier the importance which the court's analysis would give to the question.*

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari be granted.

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DECEMBER, 1961.

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* Even upon the assumption that Texas law governs, the fundamental confusion in the court's handling of basic principles in the law of torts remains. Texas follows and applies the basic principles set forth above, including the rule that when harm to the plaintiff is foreseeable, the defendant is not to be excused because the negligence became operative through an unforeseeable chain of events. *Biggers* v. *Continental Bus System, Inc.*, 157 Tex. 351, 303 S.W. 2d 359; *Sullivan* v. *Flores*, 134 Tex. 55, 132 S.W. 2d 110. Cf. *Chicago, Rock Island & Pacific R. Co.* v. *Goodson*, 242 F. 2d 203 (C.A. 5).

APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18064

REPUBLIC OF FRANCE & COMPAGNIE GENERALE TRANSATLANTIQUE, Appellants,

versus

UNITED STATES OF AMERICA, ET. AL., Appellees.

Appeal from the United States District Court for the Southern District of Texas.

(May 5, 1961.)

Before TUTTLE, Chief Judge, and HUTCHESON, RIVES, CAMERON and JONES, Circuit Judges.

RIVES, Circuit Judge: The fire upon and explosion of the S.S. Grandcamp at Texas City, Texas, while she was loading a cargo of Fertilizer Grade Ammonium Nitrate (FGAN) on April 16, 1947, resulted in more than 500 deaths, more than 3000 personal injuries, and tremendous destruction of and damage to property. It has become known as the Texas City Disaster. On May 5, 1947, two weeks

after the disaster, the Republic of France, as owner, and Compagnie Generale Transatlantique (hereinafter referred to as the "French Line)", as agent of the owner or charterer of the vessel, filed a petition in the District Court for the Southern District of New York (Admiralty No. 149–248), pursuant to the Limitation of Liability Act, 46 U.S.C. Sections 182–189, praying for exoneration from or limitation of liability for damages resulting from the explosion. That New York limitation proceeding is still pending without trial or other disposition.

On October 17, 1947, within the six-month period prescribed by 46 U.S.C. § 185, the Republic of France and the French Line filed the present like petition for exoneration or limitation of liability in the District Court for the Southern District of Texas. A long delay in bringing the latter petition to trial has been occasioned by giving precedence to the suits under the Federal Tort Claims Act, 28 U.S.C. §§ 1346 and 2674, against the United States, the manufacturer of the FGAN. Eventually, this Court held that the United States was not liable, and its decision was affirmed by the Supreme Court: *In re Texas City Disaster Litigation*, 5 Cir., 1952, 197 F. 2d 771, affirmed *sub nom. Dalehite* v. *United States*, 1953, 346 U.S. 15.

Thereafter, in 1955 Congress enacted the Texas City Relief Act, 69 Stat. 707–709. That Act left insurance underwriters to bear their own losses, but provided for payment of uninsured claims in an amount not exceeding $25,000.00 for any one claim. Pursuant to the provisions of that statute, the United States paid approximately $16,000,000.00 to victims of the disaster and obtained from the recipients assignments of their claims for death, personal injuries and property damages which totalled approximately $70,000,000.00. Thereafter, in May 1957, the United States filed in

this proceeding an amended claim based upon these assignments, not for the $16,000,000.00 paid, but for approximately $70,000,000.00, the amount originally asserted by these claimants.

The claims of all persons who made assignments to the United States were dismissed on January 27, 1958. Many persons who had not made assignments to the United States thereafter voluntarily withdrew their claims. The only remaining claimant, other than the United States, is the Texas City Railway Terminal Co. That Company did not file under the Texas City Relief Act because it was not willing to assign an uninsured loss of nearly five million dollars for the $25,000.00 maximum allowed under the Relief Act. In addition to its assigned claims, the United States filed a claim in the amount of $350,000, as successor to the Reconstruction Finance Corporation, for the loss of goods in a warehouse awaiting loading on another vessel.

Neither of petitioners here was a party to the *Dalehite* case. The cases are alike to the extent that each arises out of the Texas City Disaster. Sensibly, the trial of the present case was shortened by the introduction by agreement of the testimony in *Dalehite* of 86 of the total of 133 witnesses in that case. Four of the witneses in *Dalehite* again testified in this case, and an additional 25 witnesses testified in open court during thirteen days of trial. So that the findings and decision of the district court in this case were based not only on a large part of the evidence taken in *Dalehite*, but also on a voluminous record now comprising some 2400 pages of additional testimony. The issues in the two cases, particularly at the present stage of this limitation proceeding, are not identical.

The findings of fact and conclusions of law of the district court in this case comprise some 43 pages of the printed record, and have been published at 171

F. Supp. 497 and at 1959 A.M.C. 547. Based upon such findings and conclusions, the district court entered an interlocutory decree granting the motion of the petitioners for leave to implead the United States,[1] and denying the petitions for exoneration or limitation.[2] This appeal is from that decree.

The only ultimate issue so far determined by the district court is that the petitioners are not entitled to exoneration from or limitation of liability. The merits of the claims or of the impleading petition have not yet been determined. The decree was captioned by the district court as an "Interlocutory Decree," and for purposes of appellate jurisdiction we think that it must be so considered. See *La Bourgogne*, 1907, 210 U.S. 95, 112, 113. The jurisdiction of this Court of Appeals is that granted by 28 U.S.C. § 1292(a)(3):

> "(a) The courts of appeals shall have jurisdiction of appeals from:
>
> . . . . . .
>
> "(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty

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[1] In this connection, the district court's findings were made "without determining whether the United States may have been at fault in any particular in connection with the manufacture or shipping of the FGAN, or, if so, the effect thereof as to the various types of claims which the United States asserts, if there be such negligence it was not the sole cause of the disaster (as petitioners contend)."

[2] The operative parts of the interlocutory decree read:

"Ordered, that the motion of petitioners for leave to implead the United States of America pursuant to the 56th Rule in Admiralty of the United States Supreme Court is hereby granted and allowed; and it is further

"Ordered, Adjudged and Decreed, that said petition of the Republic of France and the Compagnie Generale Transatlantique for exoneration from and/or limitation of liability should be and hereby is denied as to each of said petitioners."

cases in which appeals from final decrees are allowed."

While interlocutory for purposes of appellate jurisdiction, this decree finally determined the rights and liabilities of the parties by denying the petition for exoneration from or limitation of liability. To that extent, the decree is not subject to the rule usually applicable to interlocutory decrees;[3] viz: that in reaching its final decree the court may exercise its discretion to re-examine any or all of its findings which form the basis of the interlocutory decree. Instead, except as to the issues which were reserved to be determined on the impleader of the United States (see footnote 1; *supra*), the present decree is res judicata on the issue of liability for the damages caused by the explosion.[4]

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[3] See Am. Jur., Judgments, Section 340; 50 C.J.S., Judgments, Section 650.

[4] British Transport Commission v. United States, 1957, 354 U.S. 129, 137, 142; affirming British Transport Commission v. United States, 4 Cir., 1956, 230 F. 2d 139, 144; Algoma, Central & Hudson Bay Ry. Co. v. Great L.T. Corp., 2d Cir., 1936, 86 F. 2d 708, 710; Gilmore & Black, The Law of Admiralty, pp. 733, 735; *cf.* Continental Grain Co. v. Barge FBL-585, 1960, 364 U.S. 19, 25.

That was substantially the position taken by Government counsel upon oral argument:

"JUDGE RIVES: Assuming that this interlocutory decree should be affirmed, where would you go from there? What would the government have to prove before it got a final decree?

MR. DAVIS: Well, assuming that the interlocutory decree is confirmed, your Honor, it goes back to the District Court for further proceedings.

JUDGE RIVES: What issues remain open? That's what I'm talking about.

MR. DAVIS. The questions of damages remain open, that is the principal one.

The district court found that the Grandcamp was unseaworthy in that she was improperly manned and

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JUDGE RIVES: What issues as to liability remain open?
MR. DAVIS: What issues as to liability remain open? In respect of the petitioners' claim for exoneration and limitation of liability, that is the question that is up before this Court, and that question will be decided now.
JUDGE RIVES: What I am asking, before you get a judgment for your damages, have you still got to prove liability, and have they got to prove—
MR. DAVIS: Yes, I have to prove liability with respect to the various claims.
JUDGE RIVES: You have to prove your damages, of course?
MR. DAVIS: That is true, that is part of it.
JUDGE JONES: When you go back, are you going to have the burden of showing that somebody on that morning threw a cigarette in the hold and that started the fire?
MR. DAVIS: No, sir, I will not have any such burden, your Honor.
JUDGE CAMERON: You take the position, or you think the Court findings have settled that finally?
MR. DAVIS: As to the cause of the fire, yes, sir, I think the Court findings have settled that.

. . . . . .

JUDGE CAMERON: You are taking the position that the question of negligence cannot be litigated again, that the Court has already found negligence on the part of this Petitioner, and that is the law of the case?
MR. DAVIS: The question of negligence, insofar as the petitioner is concerned, your Honor, cannot be litigated again. As respects the question of negligence as far as the United States is concerned, they can litigate that.
JUDGE RIVES: They can litigate that it was the United States' fault and that they are in no position to recover; do you think that issue is still open?
MR. DAVIS: Certainly that issue is still open. In the final meeting of counsel before the Trial Judge we had no objection to his allowance of the in-pleading petition, we have no reserve about meeting that. We did not want to confuse things, and thought we should decide this question first and then we will decide that. Basically that goes to the amount of damages."

improperly stowed, and that the Grandcamp's unseaworthiness was within the privity and knowledge of the petitioners.[5] The district court found also that the master and the petitioners were guilty of fault and negligence both in the origin of the fire[6] and in the failure to extinguish it in its incipient stage.[7] The court concluded:

> "From the foregoing, it follows that by reason of the fault and negligence of the petitioners, and the unseaworthiness of the vessel, all of which was within the privity and knowledge of petitioners, neither is entitled to exoneration from or limitation of liability under § 183, Title 46 U.S.C.A."[8]

All of the claims having been filed, and there being no claims for loss of or damage to cargo, it is apparent that the fire statute, 46 U.S.C. § 182, is not applicable, and that consideration can be restricted to limitation of liability, 46 U.S.C. § 183. It is apparent also that there are no claims to which seaworthiness, not in itself amounting to negligence,[9] can apply.

The findings of fault and negligence which appellants challenge on this appeal are those pertaining to the cause of the fire, and to the procedures that should

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[5] See Findings numbered 40, 41, 42, 43 and 44 at 171 F. Supp. 509, 510.

[6] See particularly Findings 31 and 37–39, 171 F. Supp. 508, 509.

[7] See particularly Findings 33–36, 171 F. Supp. 509, and Findings 45–48, 171 F. Supp. 510, 511.

[8] Petition of Republic of France, S.D. Tex., 1959, 171 F. Supp. 497, 512.

[9] See Mitchell v. Trawler Racer, Inc., 1960, 362 U.S. 539, 542–549; Michalic v. Cleveland Tankers, Inc., 1960, 364 U.S. 325, 327–328.

have been used in attempting to extinguish the fire at its incipiency.[10]

We are relieved from entering into an exhaustive review of this voluminous record to reach a decision as to whether or not those findings of fact are clearly erroneous[11] by the following considerations. All of the claims for personal injury, death, and property damage resulted not directly from fire but from explosion. The district court found no more than that the Master could have foreseen the *possibility* of explosion.

> "The Master could and reasonably should have foreseen and anticipated the danger of a disastrous fire, with the *possibility* of explosion, in failing to prevent smoking in the presence or proximity of the FGAN. His negligence in this regard constituted a proximate cause of the fire, the resultant explosion, and the damages which ensued."
>
> "'In connection with this finding as to "foreseeability", it is undoubtedly true that the force and devastating effects of this explosion shocked and surprised the scientific field as well as the transportation industry. What was not generally recognized before Texas City was (a) that ammonium nitrate would cause a detonation of such magnitude in the absence of great confinement and pressure (as within a bomb), and (b) that fire and heat alone would cause such detonation, without an initial or booster detonation; or, according to one theory, with such initial detonation resulting from an explosion of accumulated gases, which in turn

[10] The evidentiary basis for those findings is adequately disclosed in the full opinion of the district court. See 171 F. Supp. at pp. 505-511

[11] See McAllister v. United States, 1954, 348 U.S. 19; C.J. Dick Towing Co. v. The Leo, 5 Cir., 1953, 202 F. 2d 850, 853, 854.

come from the heated and decomposing ammonium nitrate.

"From the literature and information generally available, I do not believe that, in the exercise of ordinary care, the Master could have foreseen the probability of an explosion of *this sort*, even in the presence of fire. This finding should be interpreted in this light, and is based on the premises that, as he could foresee danger from fire from his negligent conduct, the 'foreseeability' test is met, and it is not necessary that he be able to foresee the *extent* of the damage which may ensue."[12]

In Texas, as elsewhere, not only proximate causal connection but also the very existence of a duty the breach of which will constitute actionable negligence depends upon reasonable foreseeability of consequences.[13]

The appellants urge as their "principal point" that, "even if unseaworthiness, fault and negligence be conceded, the district court, on the basis of its own findings, erred as a matter of law in holding that the claimed negligence which resulted in fire was the proximate cause of the injuries which resulted from the successive explosions, as its finding as to 'foreseeability' does not meet the standard of Texas law which was recognized by this Court in *Texas-New Mexico Railway Company v. Bailey*, 203 F. 2d 647 (1953)." The appellants emphasize that the district court found that the master could reasonably have foreseen only the *possibility* of explosion, and could not have foreseen "the probability of an explosion of

[12] Petition of Republic of France, S.D. Tex., 1959, 171 F. Supp. 497, 508–509.

[13] Houston Light & Power Co. v. Brooks, Tex., 1960, 336 S.W. 2d 603; Prosser on Torts, 2d ed., pp. 258, 259.

this sort," and urge upon us our statement of the rule of liability in Texas, and the decisions upon which that statement is based:

> "In Texas the test of whether a negligent act or omission is a proximate cause of injury is whether 'the wrong-doer might by the exercise of ordinary care have foreseen that *some similar injury* might result from the negligence.' Atchison v. Texas & P. Ry. Co., 143 Tex. 466, 186 S.W. 2d 228, 232; St. Louis B. & M. Ry. Co. v. Brack, Tex. Civ. App., 102 S.W. 2d 261, 273." (Emphasis supplied.)

Texas-New Mexico Ry. Co. v. Bailey, 5 Cir., 1953, 203 F. 2d 647, 649–50.

In their reply brief, the appellants concede that the case of *Hopson v. Gulf Oil Corp.*, Tex., 1951, 237 S.W. 2d 352, 356, quoted in *Chicago, R.I. & P. Co., v. Goodson*, 5 Cir., 1957, 242 F. 2d 203, 207, correctly states the rule as follows:

> "It is sufficient that the defendant would reasonably have anticipated consequences or an injury of the general nature of that which ensued."

That rule is emphasized in the more recent opinion of *Biggers v. Continental Bus System*, Tex., 1957, 303 S.W. 2d 359, 364, 365, which disapproved a holding "that one's negligence cannot be a proximate cause of an injury unless the precise manner or means of the injury resulting from the negligence can be foreseen"; and, instead, held that:

> "The true rule is correctly stated in Sullivan v. Flores where it is said that all that is necessary to establish that an actor's negligent act is a proximate cause of an injury is proof that 'As a person of ordinary intelligence and prudence, he should have anticipated the

> danger to others created by his negligent act, and the rule does not require that he anticipate just how injuries will grow out of that dangerous situation.' [134 Tex. 55, 132 S.W. 2d 111.]"

The appellees argue with much force that the district court found that fault or negligence within the privity or knowledge of the owner or owners caused the fire and permitted it to increase in intensity, and that the fire caused the disastrous explosion. The appellees insist that that causal connection is sufficient within the holding of this Court in *Chicago, R.I. & P. R. Co. v. Goodson*, 1957, 242 F. 2d 203, 207:

> "As to the element of foreseeableness which is stressed as being an important element of probable cause in Texas jurisprudence, we think it correct to say that whatever directly results by the operation of natural laws from the unlawful channelling of water onto another's premises is a foreseeable event within the Texas rule."

The fallacy in that chain of argument is that it is only the operation of natural forces theretofore recognized as normal which one is charged with foreseeing.

> "*Meaning of 'normal.'* The actor as a reasonable man is required to anticipate and provide against the normal operation of natural forces. And here the word 'normal' is used to describe not only those forces which are constantly and habitually operating but also those forces which operate periodically or with a certain degree of frequency."[14]
>
> "*Abnormal conditions of nature.* The actor is not required to anticipate or provide against conditions of nature or the operation of nat-

[14] 2 Restatement of Torts, pp. 816–817.

> ural forces which are of so unusual a character that the burden of providing for them would be out of all proportion to the chance of their existence or operation and the risk of harm to others involved in their possible existence or operation. It is therefore not necessary that a particular operation of the natural force be unprecedented. The likelihood of its recurrence may be so slight that in the aggregate the burden of constantly providing against it would be out of all proportion great as compared with the magnitude of the risk involved in the possibility of its recurrence." [15]

While in the present case there was some testimony in addition to the vast amount of evidence before the court in the Texas City Disaster Litigation, the district court still found it "undoubtedly true that the force and devastating effects of this explosion shocked and surprised the scientific field as well as the transportation industry." The district court further found as to ammonium nitrate, which constituted approximately 95% of the FGAN, and which, with the benefit of hindsight, we now know to be the explosive part of the mixture:

> "18. Despite its use as a principal ingredient of high explosives, at the time of the disaster ammonium nitrate was not, and is not now, classified as an 'explosive' for transportation purposes by the Interstate Commerce Commission or the Coast Guard. This is true because it was considered that to cause the detonation of ammonium nitrate, an initial shock or 'booster' of considerable magnitude was required. The chances of such an initial or booster detonation being encountered in normal

[15] Id. at p. 818.

> conditions of transportation has always been considered so remote as to be negligible." [16]

Substantially all of the evidence is to the effect that the explosion, as distinguished from the fire, could not reasonably have been foreseen. In the opinions of the four judges of our Court constituting the majority in the earlier case, that was pretty clearly stated. Speaking for three of the judges, the writer had said:

> "In this case, it can hardly be argued that the dangers of explosion from FGAN were so well known prior to the disaster that judgment or discretion were not called into exercise as to whether it should be manufactured at all and under what safeguards and warnings it should be distributed. Even if some danger were recognized, the necessity of providing means of existence to the devastated areas might have called for the exercise of discretion as to whether to take a 'calculated risk'." [17]

Judge Strum expressed himself more positively:

> "This explosion was wholly unprecedented. Prior to this disaster, there had been no known instances of explosions during land transit, while in stowage awaiting export, in the many shiploads previously shipped overseas, nor in this FGAN while part of it was stacked at the Texas City Terminal awaiting loading." [18]

When the case reached the Supreme Court, Mr. Justice Reed, speaking for the Court, said:

> "'There must be knowledge of a danger, not merely possible, but probable,' *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 389, 111 N.E.

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[16] Petition of Republic of France, S.D. Tex., 1959, 171 F. Supp. 497, 503.

[17] In re Texas City Disaster Litigation, 5 Cir. 1952, 197 F. 2d 771, 778.

[18] Id. at p. 782.

1050, 1053. Here, nothing so startling was adduced. The entirety of the evidence compels the view that FGAN was a material that former experience showed could be handled safely in the manner it was handled here." [19]

We agree with the view so aptly expressed in the appellants' brief:

> ". . . . It would be ironic indeed if the United States were permitted to impose liability for these claims on the Republic of France and the French Line in this litigation by claiming now that, unlike the officials and employees of the United States, the officials and employees of the French Government and the master of the Grandcamp should have known that FGAN was a dangerous explosive and that an explosion from fire should reasonably have been anticipated."

It results that the judgment must be reversed and the cause remanded with directions to adjudge that the petitioners are not liable for any claim arising out of or consequent upon the explosion of the steamship Grandcamp.

REVERSED AND REMANDED WITH DIRECTIONS.

HUTCHESON, Circuit Judge, Dissenting:

I am unable to agree with the conclusion of the majority that the findings and conclusions of the district judge are clearly erroneous and his judgment must be reversed. A careful reading and re-reading of the district judge's findings and conclusions as a whole, as they are set out in his opinion, Petition of Republic of France, as Owner and of Compagnie Generale Transatlantique, as Agent, of THE Steamship GRANDCAMP, in a cause of Exoneration from and Limitation of Liability, No. 1870, 171 F. Supp.,

[19] Dalehite v. United States, 1953, 346 U.S. 15, 42.

497, leaves me with the clear conviction that the findings of fact are well supported by the record, and that the conclusions, that the petitioner is not entitled to limitation, or exoneration from liability, are well supported in law and in fact. I cannot, therefore, concur in the opinion of the majority which rejects the findings and reverses the judgment, but must dissent therefrom.

With deference, it seems to me that the majority opinion has gone astray as a direct result of the fact that two red herrings have been carefully and sedulously drawn by appellants across the trail of true fact and law which the district judge's opinion presents.

The first of these red herrings is undue emphasis on the decisions and opinions of this court and of the Supreme Court in the first Texas City disaster case, 197 F(2) 771, 346 U.S. 16. With deference those decisions and opinions have nothing to do with this case either as res judicata or as stare decisis. This case was tried on its own facts as a separate case by a different tribunal and judge and between different parties, and decision in it cannot be controlled or influenced by what occurred in those cases for two reasons: (1) the cases were tried on different facts by a different judge; and (2) the decisions in the appellate courts were based entirely on the view that the suit came within the discretionary provision of the Federal Tort Claims Act and, therefore, could not be maintained against the United States.

The majority, therefore, in my opinion, clearly errs in giving to the opinions in the Dalehite case the effect substantially of res judicata. This is so for two reasons. In the first place, this case was tried and must be determined upon its own evidence, upon which it was, in my opinion, entirely correct for the district judge to find fault and negligence as he did. In the

second place, the Dalehite case did not go off on the conclusion of no negligence but on the conclusion that the claim was excepted out of the Act by its discretionary provision.

The second red herring is the contention that damage of the kind occurring here was not, under Texas law, reasonably foreseeable. The contention invades the function and province of the district judge and in effect runs counter to the universally prevailing rule that the particular character of damage done does not have to be foreseen, but it is sufficient if the evidence shows that some damage could reasonably have been foreseen. It is clear to me that the majority opinion errs in giving to the Texas law on foreseeability, as an element of negligence and proximate cause, a meaning and effect different from that actually ascribed to it here and in other jurisdictions.

As the first and leading case in Texas on the question, *T & P Ry.* v. *Bigham*, 90 Texas at 227, shows, the rule applied in Texas is the same as that applied generally elsewhere There the Texas Supreme Court, quoting with approval from *Milwaukee Ry. Co. v. Kellogg*, 94 U.S. 409:

> "* * it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

then went on to say:

> "This is probably as accurate a statement of the doctrine as can be given, and is substantially that generally laid down by the authorities. Upon the doctrine as abstractly stated there is a substantial consensus of opinion. That dif-

ficulties arise when we come to apply it to particular cases is not surprising when we reflect, that minds are prone to differ as to such questions; that the degree of probability rises by almost imperceptible gradations; and that the circumstances of such cases are so variant that hardly two can be found which present precisely the same state of fact. Under such circumstances it is hardly to be expected that many cases will not be found, the result of which seemingly do not accord with the doctrine as generally recognized.

"But we are not prepared to hold *that in no case can the original cause of the injury be deemed the proximate cause, where an independent and disconnected agency has supervened and brought about the result. The fact of the intervention of an independent agency, it occurs to us, bears more directly upon the question whether the injury ought, under all the circumstances, to have been foreseen;* and, where this latter fact appears, we think that the original negligent act ought to be deemed actionable. In Seale v. Railway Co., 65 Texas. 274, Chief Justice Willie says: *'If the intervening cause and its probable or reasonable consequences be such as could reasonably have been anticipated by the original wrongdoer, the current of authority seems to be that the connection is not broken.'* It follows, that in our opinion, the question of probable cause ought to depend upon the further question, whether a reasonably prudent man, in view of all the facts, would have anticipated the result—not necessarily *the precise actual injury, but some like injury, produced by similar intervening agencies.*" (Emphasis supplied.)

This court, in *Chicago, R.I. & Pac. Ry. Co. v. Goodson*, 242 F(2) 203, by Rives, Tuttle and Jones, with Judge Tuttle the organ of the court, accurately dis-

cussed and stated, and correctly applied the Texas doctrine of foreseeability.

It seems clear to me that in this maritime case the district judge correctly understood the principle obtaining and correctly applied it to find liability here. I would affirm the interlocutory decree both on limitation and exoneration of liability, without prejudice, however, to the right of the petitioner, in defense of particular claims for damages, to offer such further evidence in each case bearing on the question of foreseeability as it may desire to offer.

It seems clear to me, also, that the majority has given too much and a wrong effect to the statement of the district judge, in note 3 in his opinion, where, after having stated in the body of the opinion that the master could and should have foreseen the danger of a disastrous fire, said in the note to his opinion at that point that the master could not have foreseen the explosion that occurred. With deference, to the contrary view of the majority, it seems clear to me that the district judge was distinguishing between *what the master, as a natural man and individual, actually knew as distinguished from what, as a representative of the ship and owner, he was required in law and ought to know.* A reading of the opinion as a whole, in which the district judge points out fully his reasons for denying the limitation, shows, I think, in the clearest way that the district judge, in the note, was making this distinction and was not contradicting his finding in the body of the opinion, that the master was charged with the knowledge and ought to have known and foreseen an explosion as a consequence of the situation which was then and there obtaining.

I respectfully dissent.

JUDGMENT

EXTRACT FROM THE MINUTES OF MAY 5, 1961

REPUBLIC OF FRANCE & COMPAGNIE GENERALE TRANSATLANTIQUE,

v.

UNITED STATES OF AMERICA, ET AL.

No. 18064.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby remanded to the said District Court with directions to adjudge that the petitioners are not liable for any claim arising out of or consequent upon the steamship Grandcamp.

Hutcheson, Circuit Judge, Dissenting.

NO. 18,064

REPUBLIC OF FRANCE & COMPAGNIE GENERALE TRANSATLANTIQUE, Appellants,

v.

UNITED STATES OF AMERICA, ET AL., Appellees.

Appeal from the United States District Court for the Southern District of Texas.

(July 11, 1961)

ON PETITIONS FOR REHEARING

Before TUTTLE, Chief Judge, and HUTCHESON, RIVES, CAMERON and JONES, Circuit Judges.

PER CURIAM:

The petitions for rehearing in the above-styled and numbered cause are hereby

DENIED.

JUDGE HUTCHESON DISSENTS.

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